FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 26

IRENE BRADY, Administratrix of the Estate of EARLE A. BRADY, Deceased,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

JULIUS C. SMITH,
D. E. HUDGINS,
WELCH JORDAN,
Counsel For Petitioner.

C. CLIFFORD FRAZIER,
C. R. WHARTON,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 26

IRENE BRADY, Administratrix of the Estate of
EARLE A. BRADY, Deceased,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

JULIUS C. SMITH,
D. E. HUDGINS,
WELCH JORDAN,
Counsel For Petitioner.

C. CLIFFORD FRAZIER,
C. R. WHARTON,
Of Counsel.

INDEX TO BRIEF

SUBJECT INDEX

TABLE OF CASES CITED

STATUTES CITED

NOTES CITED

IN THE

Supreme Court of The United States

OCTOBER TERM, 1943

No. 26

IRENE BRADY, ADMINISTRATRIX OF THE ESTATE OF EARLE A. BRADY, DECEASED,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF OF PETITIONER

I. OPINION OF THE COURT BELOW

No opinion was written, delivered or filed in connection with the trial of the case in the Superior Court of Guilford County, North Carolina. The opinion of the Supreme Court of the State of North Carolina is reported in 222 N.C. 367, 23 S.E. (2d) 334, and is printed as a part of the record filed in this Court (R. 124-133).

II. JURISDICTION

The jurisdiction of this Court is invoked under Judicial Code, Section 237 (b), Amended, 28 USCA Sec. 344, for the purpose of having determined the petitioner's rights asserted and claimed under the Federal Employers' Liability Act, Amended, 45 USCA Sec. 51, *et seq.*, a statute of the United States.

III. STATEMENT OF CASE

(1) Procedural History of the Case

On July 26, 1939, the petitioner brought this action in the state court of North Carolina under the Federal Employers' Liability Act, 45 USCA Sec. 51, *et seq.* to recover damages for the death of her intestate on December 25, 1938, resulting from the negligence of the defendant carrier, while the deceased was engaged in the course of his employment as a brakeman in interstate commerce. The suit was tried at the March 30, 1942, civil term of Guilford County Superior Court before a judge and jury. Upon issues of negligence, assumption of risk, contributory negligence and damages (R.8) the case was submitted to the jury, who found all issues in favor of the plaintiff and awarded a total recovery of $20,000.00. After the entry of a judgment upon this verdict the defendant railroad appealed to the Supreme Court of the State of North Carolina where, on December 16, 1942, the judgment of the trial court was reversed (R. 133-134), thereby resulting in dismissal of plaintiff's case. On March 15, 1943, a petition for a writ of certiorari to the Supreme Court of the State of North Carolina was filed in this Court, and on May 3, 1943, the petition for certiorari was granted (R. 143).

(2) Statement of the Facts

At about 5:50 o'clock on the morning of December 25, 1938, the deceased and the other members of the defendant's freight train crew were handling a switching operation of freight cars on a storage or pass track just east of and parallel to the northbound main line track of the defendant's railroad at Hurt, Virginia. It was still dark (R. 17). The tracks at this point ran generally north and south, and the pass track was several hundred yards in length. At the north end of the pass track there was located a switch into the northbound main line and about three or four car lengths south of this switch was a derailing device. (R. 18). This derailer was situated on the east rail of the pass track, and was designed to prevent cars on the pass track from rolling out on the main

line, the grade being slightly downhill from south to north. The derailer was constructed for manual operation (R. 21) and contained a target device as a danger signal for daylight purposes (R. 23) and a place for a light as a signal at night, but there was no light on the derailer at this time (R. 21), although one has been placed on it since then (R. 21, 24). The rule book issued for guidance of the defendant's crews indicated that lights were required on derailers (R. 75). There is plenary evidence in the record that the west rail of the pass track opposite the derailer on the east rail was defective, thin and badly worn (R. 13, 25-26), that the rail was 26 or 27 years old (R. 28), and that there was little ballast under and around the cross ties, some of which were old and in poor condition and sloped to the west (R. 26). There was also evidence that the derailer itself was shaky and loose (R. 13).

When the freight train arrived at Hurt, Virginia, from Spencer, North Carolina, it travelled beyond the switch at the north end of the pass track and then backed into this siding to allow another northbound train to pass, the conductor first opening the switch and the derailer (R. 63). The deceased closed the switch and set the derailer, and the freight train remained in the pass track while the other northbound train passed (R. 21). Then the deceased opened the switch and derailer and the train pulled back on the main line north of the pass track, thereafter backed completely south of the switch, and the deceased cut the train so as to leave four empty cars attached to the back of the engine (R. 21). The locomotive and these four cars then pulled north past the switch, the deceased opened the main line switch, stepped up on the southeast corner of the lead car, a gondola, and signalled the engineer to back into the pass track where they were to pick up twelve other cars which were already standing in the southern portion of the pass track when the train arrived at Hurt (R. 18,21). The lead car upon which the plaintiff's intestate was then standing struck the north or "wrong" end of the derailer which was later found to be set on the east rail (R. 19), causing the lead truck of the car to derail. Brady was

thrown under the wheels and instantly killed (R. 18-19).

The record contains no direct testimony as to the identity of the person who closed the derailer after the deceased opened it to allow the train to return to the main line, nor did any witness testify as to who lined the switch so as to allow the train to back up south on the main line prior to cutting the train. However, the evidence is clear and uncontradicted that on this movement north out of the pass track and then back down the main line to the place where Brady cut the train the deceased was on one of the four cars just behind the engine (R. 21, 63). The defendant contended that when the train was first backed into the side track the conductor and flagman (Brandt and Scruggs) left the caboose to cover a road crossing and release the brakes of the twelve cars to be picked up from the storage track, while the plaintiff contended that at least one of them stayed on the caboose (36 or 37 cars behind the locomotive) at the back (south end) of the train where the main line switch had to be closed before the train could be backed south after coming out of the pass track. The testimony of the conductor, Brandt, was not unequivocal on this point (R. 63). The plaintiff contended that her intestate could not have, and did not, reset the derailer; that this was done by the trainman who lined the main switch for the backing movement down the main line.

There was no evidence that the deceased was familiar with the tracks and switches at Hurt, Virginia. He was a part-time extra trainman (R. 12, 79-80). On the occasion of the derailment it was dark and no opportunity existed for the deceased to inspect the rails and track bed.

In the trial below the plaintiff contended that the conductor or flagman, without notice to the deceased, negligently reset the derailer after the deceased opened it to allow the train to proceed out of the pass track; that the defendant negligently failed to equip the derailer with a warning light; and that the derailer and adjacent west rail and roadbed were in a defective condition so that a derailment occurred which

would not have happened had the track been in good condition (R. 97-100). On the other hand, the defendant contended that the track and derailer were in proper condition and that the deceased himself set the derailer and thereafter failed to open it (R. 100-103).

(3) Summary Analysis of Opinion of Court Below

A careful examination of the opinion of the North Carolina Supreme Court (R. 124-133) discloses that the decision denying recovery to the plaintiff was based upon three distinct grounds: (a) that under the evidence appearing in the record the defendant was, as a matter of law, guilty of no negligence, since it owed no duty, under the prevailing conditions, to protect the deceased from the particular injuries which produced his death; (b) that the deceased assumed the risk of injury; and (c) that the deceased's own conduct was the sole proximate cause of his injury.

IV. ASSIGNMENTS OF ERROR

The petitioner assigns for error the following:

(1) The action of the court below in holding that the case should have been non-suited, and in entering judgment providing for a reversal of the trial court and a dismissal of the case (R. 124-134);

(2) The decision of the court below that as a matter of law there was no evidence, sufficient to support the jury's verdict, that the defendant was guilty of actionable negligence upon the occasion of the death of the deceased (R. 133);

(3) The decision of the court below that as a matter of law the deceased assumed the risk of his injury and death (R. 133);

(4) The decision of the court below that the 1939 Amendment to the Federal Employers' Liability Act (August 11, 1939; 53 Stat. 1404, c. 685, 45 USCA, Sec. 54) is inapplicable to this case (R. 133);

(5) The decision of the court below that as a matter of law the alleged negligence of the deceased was the sole proximate cause of his injury (R. 133).

V. SUMMARY OF ARGUMENT

1.

The Court below usurped the functions of the jury and erroneously concluded that as a matter of law there was no evidence of probative value that the defendant was guilty of actionable negligence upon the occasion of the death of plaintiff's intestate.

2.

Plaintiff's intestate did not as a matter of law assume the risk of injury and death, because: (a) Upon conflicting testimony of substantial probative value it was the duty of the jury to determine whether the deceased assumed the risk of his injury and death; and (b) the 1939 amendment to the Federal Employers' Liability Act applied to the present controversy and eliminated the defense of assumption of risk.

3.

Under the conflicting evidence in this case it was the function of the jury to determine whether the deceased met his death solely from his own negligence.

VI. ARGUMENT

PART 1

The Court below usurped the functions of the Jury and erroneously concluded that as a matter of law there was no evidence of probative value that the defendant was guilty of actionable negligence upon the occasion of the death of plaintiff's intestate.

The plaintiff introduced the evidence of several witnesses who testified that the rail and trackbed immediately opposite the derailer were in a defective condition. The rail was 24 years old when taken out of the defendant's main line track

in 1936 and installed at Hurt, Virginia, and the underlying roadbed was not level and was supported by inadequate ballast. The derailer itself was not equipped with a signal light, although designed for one. The plaintiff introduced the evidence of two expert witnesses who testified in response to properly framed hypothetical questions that in their opinion, based upon many years of railroading experience and also observation of similar occurrences, the derailment which resulted in the death of plaintiff's intestate was caused by the defective rail opposite the rail upon which the derailer was set; that the derailment would not have occurred if the west rail had not been defective (R. 29-45). The derailer had a groove on the north or "wrong" end which would have carried the wheels on over and back on the east rail if the west rail had not been defective (R. 39-40, 137, 139, 140). Also, the derailer itself was loose and did not fit firmly upon the track. The evidence offered by the plaintiff was adequate to take the case to the jury, because regardless of who set the derailer the jury could properly find that the derailment was caused exclusively by reason of the defendant's negligence in failing to have and maintain the tracks and derailer in proper condition. When the court below held otherwise and reversed the trial court, the decision was contrary to the general Federal law and the decisions of this Court. *Tiller v. Atlantic Coast Line R. Co.*, ——U. S. ——, 87 L. Ed. (Advance Opinions) 446, ——S. Ct. ——; *Davis v. Wolfe*, 263 U. S. 239, 68 L. Ed. 284, 44 S. Ct. 64; *Cooley v. New York Central R. Co.* (C.C.A., N.Y. 1936), 80 F. (2d) 816, *cert. den.* 297 U.S. 721, 80 L. Ed. 1005, 56 S. Ct. 599; *Young v. Wheelock*, 333 Mo. 992, 64 S.W. (2d) 950, *cert. den.* 291 U.S. 676, 78 L. Ed. 1064, 54 S. Ct. 527; *Bailey v. Central Vermont R. Co*, ——U.S. ——, 87 L. Ed. (Advance Opinions) 1030, —— S. Ct. ——; *Owens v. Union Pacific R. Co.*, ——U.S. ——, 87 L. Ed. (Advance Opinions) 1221, —— S. Ct. ——; *Seago v. New York Central R. Co.*, 315 U.S. 781, 86 L. Ed. 1188, 62 S. Ct. 806; *Lilly v. Grand Trunk Western R. Co.*, ——U.S. ——, 87 L. Ed. (Advance Opinions) 323, —— S. Ct. ——.

It is implicit in the opinion of the court below (R. 128-

130) that the hypothetical questions propounded to the plaintiff's expert witnesses were properly framed and competent. Such evidence was approved by the North Carolina Court in a case of this type decided a few years ago. *McGraw v. Southern R. Co.*, 206 N.C. 873, 175 S.E. 286; 209 N.C. 432, 184 S.E. 31. (See also *Summerlin v. Carolina & N. W. R. Co.*, 133 N.C. 550, 45 S.E. 898; *Parrish v. High Point Ry. Co.*, 146 N.C. 125, 59 S.E. 348; *Britt v. Carolina Northern R. Co.* 148 N.C. 37, 61 S.E. 601; *Hester v. Motor Lines*, 219 N.C. 743, 14 S.E. (2d) 794; and Note on Use of Hypothetical Question as a Basis of Expert Opinion, 20 North Carolina Law Review 100.) In a recent decision of this Court (*United States v. Johnson*, ——U.S.——, 87 L. Ed. (Advance Opinions) 1109, ——S. Ct.——) the advisability and value of such evidence was fully recognized. It appears, therefore, that whether the question of the competency of such evidence be regarded as a matter for determination by the rules of the *lex fori*, or whether it be deemed that, because of the vital connection between such evidence and the validity of the plaintiff's cause of action under a Federal statute, the competency of the testimony will be determined by this Court, the result is the same, and the evidence must be treated as having been properly submitted to the jury.

In reaching its conclusion that the defendant was guilty of no actionable negligence, the lower court seems to have held that although the deceased may have met his death as a result of the omissions of the defendant, the manner in which the death occurred was not reasonably foreseeable and that, therefore, the defendant did not breach any duty which it owed to the deceased. In its conclusions that no duty was owing to the deceased, and that in any event a duty, if existent, was not breached, the lower court has confused not only elemental principles of the law of negligence but also the functions of the court and the jury.

The general duties which the master owes the servant are absolute and do not vary with different factual situations. Two inviolate duties which the defendant owed the deceased

in the present case were: (a) The duty to exercise reasonable care to furnish the deceased a safe place in which to work, *Bailey v. Central Vermont R. Co., supra; Washington and Georgetown R. Co. v. McDade*, 135 U. S. 554, 34 L. Ed. 235, 10 S. Ct. 1044; *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 S. Ct. 275; *Kreigh v. Westinghouse, etc. Co.*, 214 U. S. 249, 53 L. Ed. 984, 29 S. Ct. 619; and (b) The duty to furnish the deceased with reasonably safe tools. *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. Ed. 1107, 36 S. Ct. 624; *Kreigh vs. Westinghouse, etc. Co., supra.* The principle of reasonable foreseeability arises only in the determination of whether the defendant breached, in such manner as to injure the deceased, one or both of the specified duties. There was ample evidence to the effect that both duties were breached. Hence, the only material question for decision in respect to this negligence of the defendant is whether the negligence was actionable, i.e., whether it was an effective, direct and proximate cause of the derailment and the injury resulting therefrom. In other words, did the failure of the defendant to exercise reasonable care to furnish the deceased a safe place in which to work and reasonably safe tools with which to work constitute the sole cause of the injury? The ability to foresee the particular consequences of a breach of duty is the test of whether such breach is the proximate cause of the injury and whether the negligence is actionable. In cases where the facts are disputed, the question of proximate cause and reasonable foreseeability is a matter for the determination of the jury. In the present case the defendant was clearly under a duty to anticipate the possibility of the train striking from the "wrong" end a derailer which was set for derailment. The evidence was fully ample to authorize the jury to find that trains frequently struck the "wrong" ends of derailers which were set in derailing positions, and that under normal conditions derailments usually did not occur. The holding in the opinion of the court below that the consequences which might follow from a car being backed over the "wrong" end of a derailer set opposite a defective rail could not reasonably be foreseen by the defendant is

directly opposed to the evidence. The defendant's superintendent had seen twenty-five to fifty instances of cars backed over the "wrong" end of derailers (R. 55), and the plaintiff's witnesses, Holden and Heritage, stated that they had, on several occasions, seen trains strike the "wrong" end of derailers (R. 29-30, 37-38). The testimony of the witness Heritage (R. 39-40) and defendant's Exhibits 2, 4, and 5 (R. 137, 139, 140) explain the manner in which the sustaining groove in a derailer normally holds a slow-moving train on the track if the derailer is struck from the "wrong" end. Manifestly, there is no operational necessity for a derailment when the train is proceeding from the opposite direction from which the derailer is set, and the existence of this groove in the derailer is a normal and reasonable safety device. The defendant calls attention to the fact that the derailer when approached from the "wrong" end presents a blunt and vertical surface. Presumably this method of construction is required by the nature of the device itself and is the reason why the sustaining groove is necessary to safeguard against the possibility of undesired derailments.

The foregoing factual analysis of the testimony points definitely to the conclusion that there was sufficient evidence of strong probative value to require the jury to decide whether the defendant could reasonably have foreseen that the train might back over the "wrong" end of the derailer and whether the negligent failure of the defendant to provide adequate track support on the opposite rail effectively produced the derailment. The petitioner submits that on the original question of the defendant's negligence and its causal relationship to the injury sustained, there was both ample evidence to require submission of the case to the jury and to support the jury's verdict on this issue.

In the case of *Richmond and Danville R. Co. v. Powers*, 149 U. S. 43, 37 L. Ed. 642, 13 S. Ct. 748, the Court expressed in the following convincing language the rule that in uncertain and debatable cases the general questions of negligence

and contributory negligence are matters for the determination of the jury:

"It is well settled that where there is uncertainty as to the existence of either negligence, or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

A case recently decided by this Court (*Bailey v. Central Vermont R. Co., supra*) illustrates the duties which the Federal Employers' Liability Act imposes upon the railroad in factual situations similar to the case here presented. The *Bailey case* is compelling authority in support of petitioner's contention that, where, as in this case, the sum of the evidence produces conflicting testimony on the issue of the railroad's alleged negligence, the jury should be permitted to draw the inferences of fact and make the necessary determination with regard to the effective cause or causes of the occurrence. As in the *Bailey case*, this Court is requested by the petitioner to reject the judicial philosophy which apparently induced the court below to adopt a strict and limited construction of the Act. In the *Bailey case* the railroad was negligent in requiring the deceased to unload cinders at an unnecessarily dangerous place and under unnecessarily dangerous conditions; in the present case, the railroad required Brady to engage in a shifting operation at a place and under conditions which were rendered dangerous by reason of the railroad's negligence in the maintenance of its tracks, roadbed and derailer, and in the failure to provide a light on the derailer. The defendant undoubtedly contemplated the danger of an adverse verdict on the issue of its failure to maintain the track and derailer in proper condition, because it undertook to produce much evidence *contra* on this exact question (R. 64-69). The defendant's recognition of its duty to the deceased may be inferred from this evidence relating to its test and safety practices. It follows, therefore, that irrespec-

tive of who may have set the derailer the jury in this case were correctly charged with the responsibility of determining whether the railroad's negligence was the effective cause of the injury.

The defendant's actionable negligence may also be predicated upon that phase of the evidence which tends to indicate that a fellow servant reset the derailer after the deceased had opened it and that no warning or notice was thereafter given to the deceased. It is conceded by the defendant that no injury would have resulted to the plaintiff's intestate if the derailer had not been reset by someone, and the evidence is uncontradicted that there was no warning light upon the derailer which would have enabled the deceased to have observed that it was set on the rail. Therefore, if there is evidence from which the jury could find that a fellow servant set the derailer without specifically warning the deceased, then the plaintiff's recovery in the trial court should be sustained, because it appears from the evidence that during *switching* operations it is the usual rule and custom for the derailer to be kept off the track until the switching operation is completed (R. 45, 54, 81). This contention of the plaintiff was urged in the trial of the case and was presented for the consideration of the jury (R. 97-99).

In considering the testimony which bears upon this theory of the case it must be remembered that the only persons who had any knowledge of these facts were the surviving members of the train crew, all of whom were employees of the defendant and available as its witnesses. Not a one of them testified that the deceased reset the derailer after the train pulled north out of the pass track: the plaintiff could not hazard putting the direct question to the defendant's employees and the defendant carefully refrained from examining them on this point. It is submitted that when the testimony of the members of train crew is viewed in the light most favorable to the plaintiff it points unerringly to the conclusion that Brandt, the conductor, put the derailer on the track after the freight train cleared the switch before backing south on the main

line. This negligent act of a fellow servant, proximately resulting in the derailment which killed the plaintiff's intestate (R. 85), imposed liability upon the defendant. *Owens v. Union Pacific R. Co., supra.*

We review briefly the pertinent testimony of the members of the train crew: the fireman, Dorsett, said that when the train first arrived at Hurt, Virginia, "Mr. Brady was up on the engine with us [engineer and fireman]. Someone at the rear of the train had to turn the switch for it to back in and had to change the derailer, if it was closed. It would be closed because there were twelve cars in the pass track." (R. 83). The conductor said that he threw the switch and derailer so as to permit the train to back into the pass track (R. 63). At this time the conductor, Brandt, and the flagman, E. C. Scruggs, were on the caboose at the rear of the train (R. 63, 85). After the train backed into the pass track the deceased lined the switch for the northbound passenger train to pass on the main line (R. 21). The engineer and flagman testified that after the northbound passenger train (No. 30) passed by, Brady opened the derailer and switch so as to allow the train to pull back north into the main line before backing south to cut the train between the fourth and fifth cars (R. 21, 85). The twelve cars in the pass or storage track were to have been inserted between the fourth and fifth cars of the train (R. 18). During this operation the deceased was "on the four cars" next to the engine (R. 21, 63, 83), and the conductor, Brandt, was on the caboose at the rear of the train (R. 63, 85). The train then backed in a southward direction along the main line until it was south of the pass track switch, and "Mr. Brandt rode the rear end of the train when it backed up the main line." (R. 85). During this movement the deceased was on the fourth car (R. 21, 86). No one testified as to who lined the switch on this occasion so that the train could back south on the main line, the flagman stating that he did not know "who turned the switch so that the train could come back on the main line." (R. 86.). But the defendant's witness M. I. Scruggs,

a freight engineer of many years experience on the run through Hurt, Virginia, testified that on such operations the head brakeman (the position occupied by the deceased) "generally stays...up around the front of the engine" (R. 80), and in coming out of the pass track "the caboose is the last thing that comes out, and when the caboose is clear of the switch someone has to throw that switch, and it is the conductor or flagman or swing man that does it, then the train comes on down the track" (R. 81). In response to a direct question this witness said that on such a movement the flagman and conductor would be at the back of the train "to close the switch and fix the derailer" (R. 81).

When the train was cut the deceased rode north up the main line beyond the pass track switch; the locomotive and four cars stopped; Brady opened the switch and signalled the engineer to back into the pass track, and then the derailment occurred when the lead truck of the fourth (or lead) car struck the derailer.

Upon this evidence arise the questions of when and by whom was the derailer set before the derailment occurred. There can be no dispute that it was set during the time which elapsed after the caboose passed beyond it on the northward movement out of the pass track and the happening of the fatal accident. It is submitted that upon the evidence adduced at the trial, as outlined above, only the conductor, Brandt, was in a position to line the switch during this period of time, and the jury were amply justified in reaching the conclusion that he likewise "fixed the derailer" at the same time. It is manifest that the deceased could not, and did not, close the switch or set the derailer on this occasion. The brakeman (Brady) handled the switching at the *front* of the train and the conductor handled the operations at the *rear*, including the one in which the derailer was negligently reset. Under these circumstances, the instant case is clearly one in which the jury might properly find that the conductor was guilty of negligence proximately resulting in the death of the plaintiff's intestate. *Owens v. Union Pacific R. Co., supra.*

The petitioner believes that this Court, in harmony with its recently expressed liberal interpretation of the Act, will not permit the court below to substitute its judgment for that of the jury in this case, where all major facts are disputed and where the evidence is materially conflicting.

It is submitted that the Supreme Court of the State of North Carolina has, in this instance, wholly failed to follow the controlling principles of law applicable to this type of case in measuring the sufficiency of the evidence of defendant's actionable negligence.

PART 2

The deceased did not as a matter of law assume the risk of his injury and death.

(a) *The jury were properly permitted to find, upon conflicting testimony of substantial probative value, that the deceased did not assume the risk of his injury and death.*

If it be assumed, *arguendo*, that the 1939 Amendment (August 11, 1939; 53 Stat. 1404, c. 685, 45 USCA Sec. 54) to the Federal Employers' Liability Act did not operate to eliminate the defense of assumption of risk in this case, or if it be decided that the plaintiff waived the benefit of the retroactive effect of the amendment, it is nevertheless submitted that reasonable inferences to be drawn from the conflicting testimony fully justified the jury's verdict on the issue of assumption of risk. The evidence fails to disclose that the deceased had ever engaged in a railroad operation at Hurt, Virginia, or had ever even stopped at that point. The particular shifting operations occurred at a time when it was dark (R. 17); there was no light on the derailer, although a place for such a light existed (R. 21); the derailment occurred on a curve; and the derailment would not have occurred except for the defective condition of the rail and track at the point directly opposite the derailer (R. 33, 39). In view of the foregoing facts, and particularly since the testimony as to who actually reset the derailer points to a fellow servant of the deceased, it is apparent that the appropriate issue in-

volving assumption of risk was properly submitted to the jury for determination, and that the issue could not correctly be decided as a matter of law. The North Carolina Supreme Court substituted its judgment for that of the jury, and with a complete disregard for, or indifference to, the conflicting evidence, concluded that as a matter of law the deceased assumed the risk of injury.

The latest decision of this Court on the general subject of assumption of risk (*Owens v. Union Pacific R. Co., supra*) demonstrates the view of this Court to the effect that assumption of the risk should not be permitted to bar recovery by masquerading under spurious guises such as "non-negligence", "sole negligence", "primary duty violation". By legislative action the outmoded absolute defenses of fellow servant negligence and contributory negligence were eliminated, and this Court has emphatically decided in the *Tiller and Owens cases, supra*, that these defenses shall not be permitted to assume the cloak of assumption of the risk. In the same manner, this Court has refused to permit assumption of the risk to be used as a basis for a judicial fiat that no negligence exists in cases where the evidence, when considered independently of the employee's own conduct, is highly conflicting upon the subject of negligence of the railroad. In other words, in cases where the defense of assumption of the risk may be appropriately interposed, it must be regarded as a pure defense and not as a basis for declaring that the railroad was not negligent in situations where extensive evidence of actual negligence is presented.

In the case of *Bailey v. Central Vermont R. Co., supra*, the judicial policy of permitting the jury to decide questions of the railroad's negligence in cases involving controverted facts was effectively established. Similarly, in the *Owens case* it has been declared that upon conflicting testimony, such as exists in the instant situation, the jury shall not be deprived of the right to determine whether or not the injured employee is chargeable with his own injury by reason of his alleged assumption of the risk or independent conduct.

An analysis and comparison of the evidence and the factual situations in the *Owens case* and in the present case leads inescapably to the conclusion that the *Owens case* is convincing and controlling authority to support the contention that the jury must be permitted to determine whether the deceased by his own conduct (whether such conduct be labelled assumption of risk, sole negligence, violation of primary duty, or contributory negligence) effectively caused his own death. In the *Owens case*, the undisputed testimony disclosed that the deceased intentionally walked, without keeping a lookout, directly into a known danger and risk, in that he attempted to walk across the track at a time when he knew that almost instantaneously the cars which were in close proximity to him on the same track *would* or *might* (depending upon the jury's view of the evidence) be "kicked" suddenly toward and upon him. In Brady's case, the deceased's actions constituted, at most, negative negligence, i.e., a failure to ascertain that the train was backing toward a dangerous condition. In the light of the *Owens case*, the jury were properly permitted to appraise the practical effect of Brady's conduct. As said by this Court in the *Owens case, supra*, (at p. 1225 of the L. Ed. Advance Opinions), when "Congress abolished the fellow-servant rule as a defense under the statute, it necessarily abolished the defense of assumption of risk to this extent. In other words, it eliminated the general anticipation of fellow servants' negligence. . . ." Since the defendant failed to make any showing that the deceased knew of and accepted the specific risk in this particular instance, the failure of plaintiff's intestate to ascertain that the derailer had been reset could at most be merely some slight evidence of contributory negligence, and this has been resolved against the defendant by the jury's verdict (R. 8).

(b) *The 1939 Amendment to the Federal Employers' Liability Act applied to the present controversy and eliminated the defense of assumption of risk.*

The 1939 Amendment (August 11, 1939; 53 Stat. 1404, c. 685, 45 USCA Sec. 54) made Section 4 of the Federal Em-

ployers' Liability Act read as follows (the language of the Amendment being in italics):

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case *where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case* where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

In construing the amendment this Court held in the case of *Tiller v. Atlantic Coast Line R. Co., supra*, that every vestige of the doctrine of assumption of risk was eliminated by the statute. However, this Court has not yet directly determined whether the amendment applies to causes of action which arose prior to the enactment of the amendment, but where the trials occurred subsequent thereto. (*Owens v. Union Pacific R. Co., supra*). The injury and death of the deceased in the present case occurred on December 25, 1938, the amendment was enacted as of August 11, 1939, and the case was tried in March, 1942. In the opinion in the lower court it was said: "The amendment of 1939 to the Federal Employers' Liability Act is inapplicable here . . ." It will also be observed from an examination of the brief in opposition to petition for writ of certiorari that the respondent contends that by submitting to or acquiescing in the submission to the jury of an issue on the question of assumption of risk the petitioner is now precluded from asserting that the 1939 Amendment applied to the present case. For the reasons set forth in petitioner's brief in reply to the respondent's brief in opposition to petition for certiorari, it is respectfully contended that this Court should consider the question of the applicability of the 1939 Amendment to the present controversy. It is immaterial that this particular point was not raised in the state trial court, because

the Supreme Court of North Carolina has undertaken to pass upon this Federal question of law. Therefore, the matter is open for the determination of this Court, since the highest state court has decided against the claim under the Federal law. *Home Insurance Co. v. Dick*, 281 U.S. 397, 74 L. Ed. 926, 50 S. Ct. 338; *Gant v. Oklahoma City*, 289 U.S. 98, 77 L. Ed. 1058, 53 S. Ct. 530.

Defenses in actions governed solely by statute are matters of Congressional favor and grace and not matters of right. Accordingly, Congress may withdraw such defenses and make such withdrawal effective at any date which it deems advisable, and it may give effect to such legislation in respect to a pending action.

In view of the remedial and curative character of the Amendment, and because of its socially progressive object, the statute should be construed liberally in all respects, and the usual presumption against retroactivity should be deemed inapplicable to this situation. The salutary purpose of the amendment should be enlarged—not restricted.

If the emasculating effect of the doctrine of assumption of the risk (*Lilly, Tiller, and Owens cases, supra*) was a special evil which Congress sought to eliminate in connection with the general problem of providing a system of compensation for injuries to employees engaged in interstate railroad operations, then there is no legal reason, other than possible interference with a vested right, which should operate in favor of a restriction of the amendment to cases arising after the enactment of the change in the law. It is elemental legal learning that if the question is one of remedy the power to enact a retroactive law rests in the legislative authority and does not impinge upon a vested right.

In the case of *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 63 L. Ed. 1058, 39 S. Ct. 553, this Court held that no person has a vested right entitling him to have unchanged the existing rules of law concerning an employer's responsibility for personal injury or death of an employee.

The following cases also support the view that the power resided in Congress to give retrospective force to the 1939 Amendment:

South Carolina v. Gaillard, 101 U.S. 433, 25 L. Ed. 937; *Ewell v. Daggs*, 108 U.S. 143, 27 L. Ed. 682, 2 S. Ct. 408; *Campbell v. Holt*, 115 U.S. 620, 29 L. Ed. 483, 6 S. Ct. 209; *Carpenter v. Wabash R. Co.*, 309 U.S. 23, 84 L. Ed. 558, 60 S. Ct. 416.

The statute as it existed at the time of the trial abolished the defense of assumption of the risk "in *any* action *brought* . . . under . . . the . . . Act . . ." There is no limitation of applicability to "new actions", or "suits upon causes of action hereafter arising", or to similar situations which might indicate a prospective operation of the statute. The use of the word "brought" instead of the words "to be brought" indicates that the Amendment was intended to apply to all cases under the Act, including those then pending but not tried.

When Congress enacted this revision of the law, no saving or exclusion clause with reference to pending claims or litigation was included, nor did the amendment specify that it was to become operative at some future date or with respect only to a particular class of such cases. The Amendment was manifestly intended to clarify the existing section of the statute and give it a meaning consistent with the beneficial purposes which the act was designed to achieve. Judicial construction of the original Sec. 4 had produced results not contemplated when the statute was first enacted, *Tiller v. Atlantic Coast Line R. Co., supra.*

The 1939 Amendment abolished the concept, doctrine, and *defense* of assumption of risk. In other words, from the moment it became law railroad carriers sued under the Act were deprived of the right to plead and rely upon this defense which was formerly available to them. Congress evidently intended to ameliorate immediately what Justice Black has referred to as the morally unacceptable proposition that a man compelled

by economic circumstances to follow a hazardous employment must bear the consequences attendant upon the risks known to him. *Tiller v. Atlantic Coast Line R. Co., supra,* footnotes 20-22, inclusive. To give the Amendment the retroactive application which is suggested would deprive the defendant of no right in this case. The 1939 Amendment automatically removed this defense from all cases not previously adjudicated.

In the decision of the North Carolina Supreme Court the term "assumption of risk" is actually used to denote a means of appraising the defendant's negligence (as well as the alleged sole negligence of the deceased). This analysis is suggested by the *Tiller case, supra.* Since this is true, if the 1939 Amendment to the Act completely eliminated the concept of assumption of risk, irrespective of the date when the accident may have occurred, this Court should weigh the defendant's negligence on scales not affected by the weight of a discarded doctrine.

For the foregoing reasons it is submitted that the action of the lower court in dismissing the plaintiff's case on the grounds of assumed risk was erroneous.

PART 3

Under the conflicting evidence in this case it was the function of the jury to determine whether the deceased met his death solely from his own negligence.

The North Carolina Supreme Court, although confusing the concepts of assumed risk and sole negligence, expressly held that the deceased's own conduct was the sole proximate cause of his injury and death (R. 133). This decision was apparently based upon the court's assumption that the deceased set the derailer in derailing position immediately prior to the derailment, and upon the court's conclusion that it was the duty of the deceased to open the derailer before he signalled the train into the pass track.

The evidence on the question as to who set the derailer is not positive and direct but wholly circumstantial (see discussion above under Part 1 of the Argument), and the jury

could find from the testimony that the deceased set the derailer, or that the conductor did so, or that the evidence was too speculative to warrant a definite decision on this particular point. It will be noted that the testimony of the conductor himself (R. 63) does not preclude the view that he set the derailer when the train left the pass track following the passage of the northbound passenger train, and the other evidence tends to indicate that he did reset it. It is significant that notwithstanding the highly circumstantial character of the evidence upon this subject, the court below assumed as a matter of law that the deceased placed the derailer on the rail, and in reaching this conclusion the court below predicated its view upon only that portion of the evidence which placed the deceased near the derailer during a part of the operations. The inference to be drawn on this subject was clearly a matter for the determination of the jury, and by reason of its answers to the first, second and third issues the jury of necessity reached one of the following conclusions with regard to the setting of the derailer: (a) that the deceased did not set the derailer, and that it was set by some other employee of the defendant; or (b) that even if the deceased did set the derailer, this conduct of the deceased was not the proximate cause of the derailment; or (c) that the evidence would not permit a determination of this fact which became immaterial upon a finding that the proximate cause of the accident was the defective condition of the west rail and underlying track bed. In view of the cumulative and conflicting character of the evidence, the question of proximate cause was properly determined by the jury. As pointed out above, Brady opened the derailer and switch, but the jury might readily conclude that he could not (because of his position at or near the front of the train), and did not, line the switch and reset the derailer. Certainly the testimony of the witnesses Holden and Heritage (R. 33, 39) justified a conclusion by the jury that regardless of who set the derailer, the negligence of the defendant in maintaining a defective west rail and track proximately caused the derailment.

The petitioner calls attention to the fact that there is no evidence to justify the lower court's statement that the deceased was under a duty to open the derailer. Unless the deceased himself set the derailer or knew that it had been set, the deceased could not be required as a matter of law to assume the unconditional responsibility of removing the derailer before the train entered the pass track on the fatal operation. *Owens v. Union Pacific R. Co., supra.* At most the question was a problem for the consideration of the jury, and the jury has elected to adopt a view of the evidence which exonerates the deceased from responsibility, or at least which determines that the actions or omissions of the deceased were not one of the effective proximate causes of the derailment and the injury.

In appraising the conduct of Brady the lower court not only invaded the province of the jury, but after having done so (and after having decided, upon controverted evidence, that the deceased was negligent) described what at most was "contributory negligence" as "sole negligence" and "assumption of the risk", and in this respect employed its own version of the "primary duty rule" as a means of denying any recovery. In the *Tiller case, supra,* this Court impliedly rejected a similar system of reasoning through legal clichés which was the basis for the decisions in the cases of *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91, and *Davis v. Kennedy,* 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 33.

The court below assumed the role of the jury, and also fell into the common error (commented upon by this Court in the cases of *Tiller v. Atlantic Coast Line Railroad Co., supra,* and *Owens v. Union Pacific R. Co., supra),* of confusion of terms in its analysis of the effective cause of the derailment. In this latter connection we call attention to the following language from the court's decision: "Hence having himself handled the derailer, and having neglected to place it open for this last movement of cars, as it was his duty to do, he would be conclusively deemed to have assumed the risk of injury which was caused by his own act or omission. . . . . And his neg-

ligence in this respect would be regarded as the sole proximate cause of his injury. . . ."

In the first instance the court disregarded strong evidence to support the view that the defendant should have foreseen the particular hazard to which the deceased was subjected by the defendant's negligent acts, and held that as a matter of law the defendant was not negligent. Then the court proceeded to label as "assumption of the risk" and "sole negligence" conduct which under any reasonable interpretation was at most some evidence of contributory negligence. In other words, by the artful use of nomenclature and by ignoring conflicting evidence the court below developed a theory which improperly withdrew the case from the jury and which in effect constituted the court as the triers of the facts.

In recent cases decided by this Court general emphasis has been placed upon a liberal and humane approach to questions of liability under the three kindred statutes—Federal Employers' Liability Act, 45 USCA Sec. 51, *et seq.*; Boiler Inspection Act, 45 USCA Sec. 22, *et seq.*; and Safety Appliance Act, 45 USCA Sec. 1, *et seq.* In the case of *Lilly v. Grand Trunk Western R. Co., supra,* Justice Murphy referred to the "humanitarian purpose" of this field of legislation, and also observed that the Boiler Inspection Act should be "liberally construed in the light of its prime purpose, the protection of employees and others. . . ." Similarly, in the case of *Bailey v. Central Vermont R. Co., supra,* Justice Douglas observed: "Reasonable care and cause and effect are as elusive here as in other fields . . . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them". Petitioner does not argue that in cases where there is no evidence of probative value to establish actionable negligence of the defendant the jury should be converted into a legal mechanism for fixing the amount of the recovery under a psuedo-workmen's compensation system. But it is respectfully asserted that this case, in its worst light from petitioner's viewpoint, falls within the liberal approach which this Court has

approved in situations involving debatable theories as to the cause of injury, and that there was ample basis and compelling justification for submitting all issues of negligence, causation, and damages to the jury.

VII. CONCLUSION

For all of the above reasons, the petitioner respectfully submits that the Supreme Court of the State of North Carolina grounded its decision upon erroneous conceptions of the general principles of negligence as enunciated by this Court in the construction of the Federal Employers' Liability Act. It is further submitted that the dismissal of the action by the court below constituted an unwarranted invasion of the province and functions of the jury (*Jacob v. City of New York*, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854), and deprived the plaintiff of her rights under the Federal statutes. The court below failed to give proper legal weight to the integrated and cumulative character of the evidence, and, due to an isolated and piecemeal consideration of the evidence and the disputed facts, the court below erroneously concluded that no jury question was presented by the testimony. This approach has been rejected by this Court in cases similar in principle to the present case. *Bailey v. Central Vermont R. Co., supra; Union Pacific R. Co. v. Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318.

In view of the foregoing considerations, petitioner requests this Court to reverse the decision of the North Carolina Supreme Court and to direct an affirmance of the judgment of the trial court.

Respectfully submitted,

JULIUS C. SMITH,
D. E. HUDGINS,
WELCH JORDAN,
Counsel for Petitioner.

C. CLIFFORD FRAZIER,
C. R. WHARTON,
Of Counsel.